

# CMS Proposes New Disclosure of Ownership Regulations for Nursing Facilities - Top Five Takeaways for Private Equity Firms and REITs

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Private equity (PE) ownership of health care providers is unquestionably under scrutiny by federal and state regulators. States are passing laws that either directly or indirectly target PE health care transactions. For example, New York introduced [new legislation on February 1st](#) that would provide the New York State Department of Health authority to review and approve certain “material transactions” involving PE firms. Further, President Biden specifically targeted “Wall Street firms’ takeover” of nursing facilities in his 2022 State of the Union address, citing quality concerns related to facilities owned by PE firms. The Centers for Medicare & Medicaid Services (CMS) followed suit last week when it released [proposed regulations](#) requiring skilled nursing facilities (SNFs) to disclose PE company or real estate investment trust (REIT) ownership.

Below we highlight the top takeaways related to the proposed regulations for PE firms and REITs.

## **1. CMS will Require SNFs to Identify Any Direct or Indirect Owners That Qualify as “Private Equity Companies” or “Real Estate Investment Trusts”**

If CMS finalizes the proposal, SNFs will be required to disclose PE and REIT ownership. To accomplish this task, CMS proposes to add data elements to the CMS-855A, the Medicare enrollment form used by SNFs, that would direct SNFs to disclose whether any of their owning or managing entities qualify as a “private equity company” or a “real estate investment trust,” as the terms are defined by CMS (the “PE/REIT Tag”).

CMS seeks to define a “private equity company” and a “real estate investment trust,” in very simplistic terms:

- Private equity company means, for purposes of this subpart only, a publicly-traded or non-publicly traded company that collects capital investments from individuals or entities and purchases an ownership share of a provider.

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- Real estate investment trust means, for purposes of this subpart only, a publicly-traded or non-publicly traded company that owns part or all of the buildings or real estate in or on which a provider operates.

CMS specifically requested comments on these definitions and acknowledged that they “may be modestly different from definitions” in other settings. Given the complexity of both entity types, we expect that CMS will receive many comments on these definitions and likely will refine them as a result.

## **2. CMS Already Requires Disclosure of All 5% Direct and Indirect Owners**

CMS regulations already require SNFs to disclose all owners holding at least a 5% direct or indirect ownership interest. As such, CMS already has a mechanism in place to collect ownership information on PE and REIT investments. The proposed rule does not change this requirement but seeks to add the PE/REIT Tag in an apparent effort to force a more explicit disclosure.

## **3. Disclosure Obligations Turn on Whether a Legal Entity Associated with a PE Company or REIT is an “Additional Disclosable Party”**

In addition to the PE/REIT Tag, the proposed regulations add four new data elements to the CMS-855A. These elements will require the SNF to disclose:

- each member of the governing body of the facility, including the name, title, and period of service of each such member;
- each person or entity who is an officer, director, member, partner, trustee, or managing employee of the facility, including the name, title, and period of service of each such person or entity;
- each person or entity who is an “additional disclosable party” of the facility; and
- the organizational structure of each additional disclosable party of the facility and a description of the relationship of each such additional disclosable party to the facility and to one another.

Depending on the situation, a legal entity of a PE company or a REIT (or one of its affiliates) might qualify as an “additional disclosable party” under CMS’s proposed definition, which includes any person or entity that:

- exercises operational, financial, or managerial control over the facility or a part thereof, or provides policies or procedures for any of the operations of the facility, or provides financial or cash management services to the facility;
- leases or subleases real property to the facility, or owns a whole or part interest equal to or exceeding 5 percent of the total value of such real property; or

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- provides management or administrative services, management or clinical consulting services, or accounting or financial services to the facility.

We note that this definition focuses primarily on the control at the local facility level and that the preamble provides little guidance regarding what “operational, financial, or managerial control” of a facility specifically means.

If a legal entity of a PE company or REIT meets this definition, it would be listed as an additional disclosable party (even if it does not hold a 5% or greater ownership interest in the facility). In addition, the SNF would have to describe its “organizational structure” and its relationship to the facility and to one another. The organizational structure depends on the type of legal entity identified as an additional disclosable party. For example, an LLC would have to disclose its members and managers while a limited partnership would have to disclose the general partners and any limited partners who have an ownership interest of 10% or more.

#### **4. PE/REIT Ownership Will be Publicly Available**

A stated goal of these regulations is to facilitate “greater transparency regarding SNFs’ owners and operators.” CMS thus will make the data collected under the regulations publicly available one year after they become final.

CMS already makes ownership information available via the [Nursing Home Compare website](#), and its [data.cms.gov](#) website publicly posts information on SNFs’ officers, directors, managing employees, and direct and indirect owners. The key additional data that would be collected under the regulations, if finalized, would include: (i) PE company or REIT ownership and (ii) information about “additional disclosable parties.” Given that CMS makes some of this data available already, it is unclear how much this information will impact patient choice.

#### **5. Required Disclosure Across Medicare and Medicaid Could be Burdensome**

CMS seeks to require state Medicaid programs to collect similar information from SNFs. However, CMS does not have the authority to dictate how they must collect this information and can only impose minimum disclosure requirements on states.

State Medicaid programs thus can decide to collect additional information. Further, while CMS is trying to consolidate all required information into the CMS-855A to avoid duplicate reporting, states do not have to follow suit. A state can require SNFs to report required information under these regulations separately from what it already requires for enrollment, which could present an added reporting burden.

### **Conclusion**

This proposed rule begs the question of whether CMS will seek to require other providers and suppliers to make similar disclosures regarding PE company or REIT ownership. While CMS believes that making this information public will allow patients and their families to make more informed choices and will permit CMS to better understand how PE company or REIT ownership affects patient outcomes, critics of the proposed rule already are questioning whether this effort detracts

attention from more important issues, such as inadequate reimbursement rates and staffing shortages. Given that PE companies and REITs combined own approximately 17 percent of SNFs, the value of requiring and publicizing these disclosures does seem questionable.

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